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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARSON OPTICAL, INC., *Plaintiff,* v. RQ INNOVASION INC. And BRENDAN ZHENG, *Defendants.*	Civil Action No: 1:16-cv-01157-LDW-ARL

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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Defendants RQ INNOVASION, INC. ("RQ") and BRENDAN ZHENG ("Mr. Zheng" together with RQ, "Defendants"), by and through their undersigned counsel, hereby move for an order against Plaintiff CARSON OPTICAL, INC. ("Carson"), pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(2) and (6), dismissing (i) this action in its entirety, because this Court lacks personal jurisdiction over the out-of-state Defendants; and (ii) all claims against Mr. Zheng and RQ for failure to state a cause of action.

PRELIMINARY STATEMENT

As a threshold matter, Carson's Complaint rest upon baseless, conclusory and, sometimes, false statements regarding Defendants' alleged contacts with New York. RQ is a Canadian entity, with no New York presence or contacts, and Mr. Zheng is not a resident of the State of New York. Carson's Complaint alleges absolutely zero facts regarding Defendants' alleged contacts with New York. Further, Carson posits absolutely no evidence that Mr. Zheng owns, operates or is individually responsible for any content on the eBay, Amazon, or shopfacncii.com Web sites. Even if it were true that simply filing suit in New York somehow confers personal jurisdiction over Defendants in the absence of any jurisdictional allegation, Defendants do not have any contacts with the State of New York that would support an exercise of personal jurisdiction here. Thus, Carson has failed to allege any facts that would support a *prima facie* showing of personal jurisdiction over out-of-state Defendants.

Second, Carson's Lanham Act claim for RQ's allegedly false advertising (Count One) should be dismissed. Carson's Complaint does not allege that any of RQ's advertisements of RQ's *own* products either reference or implicate Carson. Further, Carson does not allege any actual pecuniary loss attributable to Defendants' advertising.

Third, Carson's claim for unfair competition (Count Two) is based in the faulty premise that RQ is required to collect or pay New York sales taxes by virtue of listing items for sale on the Website Amazon.com (when it has no additional connection with the State), which in turn damages Carson because Carson pays those taxes. Carson's claim here is not really clear, but under any rubric, it is not a cause of action. The New York legislature and the Supreme Court have summarily rejected this argument and it should be dismissed as a matter of law. To the extent that Carson claims that its state law unfair competition claim is essential duplicative of its Lanham Act claim, that too fails.

Finally, Carson's Complaint, in conclusory fashion, charges Mr. Zheng with respect to all counts, presumably in an attempt to hold Mr. Zheng *individually* responsible as the primary actor with respect to RQ's conduct in question. However, there is no factual support for Plaintiff's contention. As a result, Mr. Zheng must be dismissed from this Action entirely.

FACTUAL BACKGROUND[1]

I. False Allegations of Jurisdiction in the Complaint

By Complaint dated March 8, 2016, Plaintiff Carson Optical, Inc. ("Carson") filed this action against Defendants for claims sounding in false advertising under the Lanham Act (Count One) and unfair competition under state common law (Count Two) (the

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[1] The facts set forth herein are based on the Complaint, documents attached to the complaint as an exhibit, matters of which judicial notice may be taken, and documents either in plaintiff's possession or of which plaintiff had knowledge and relied on in bringing suit. *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

"Complaint") (ECF No. 1). Carson's purported claims arise from RQ's advertising of its *own* FANCII®-branded magnifying glasses on the Internet via Amazon.com—which Carson claims have marginally mislabeled magnifying power ranges (i.e., "2.5X" versus "2.13X" and "5X" versus "4.63X"). *See* Complaint, ¶¶ 8, 19-20.

Carson alleges that RQ is a Canadian corporation with an address in the Province of Alberta, Canada. Complaint, ¶ 3. Carson's Complaint makes only the following scant "jurisdictional" allegations concerns this Court's personal jurisdiction over Defendants:

> 6. RQ Innovasion, under the ownership, direction and control of Zheng, has continuously and extensively done business in this Judicial District, by, without limitation, engaging in (i) false advertising of goods within this Judicial District, (ii) unfair and deceptive competition in this Judicial District, and (iii) directing these illegal and wrongful acts against Carson, a direct competitor, who is located in this District.
>
> 7. RQ Innovasion, under Zheng's direction, control and to his personal benefit, transacts business on eBay under the seller name "rqinnovasion" and on Amazon under the name "Fancii."
>
> 8. Additionally, RQ Innovasion has registered the mark, FANCII[®], with the United States Patent and Trademark Office and, upon information and belief, operates the website http:/ /buy.shopfancii.com.
>
> 9. Utilizing these internet marketplaces, RQ Innovasion and Zheng have engaged in false advertising and the other wrongful conduct complained of herein throughout the United States, including in this District.

See Complaint, ¶¶ 6-9.

However, Carson's allegations in support of its "false advertising" claims provide no further detail as to Defendants' connection to the State of New York, nor what were the "acts against Carson" that supposedly provide a jurisdictional basis. *See* Complaint.

For instance, in the Complaint, Carson alleges, "Defendants have purposefully used targeted advertising campaigns to illegally compete against Carson, including on Amazon, *and have done so utilizing their false advertisement claims.*" Complaint, ¶ 31. (Emphasis added). However, Carson's own "false advertisement" claims prove RQ has nothing to do with Carson. The alleged fact that RQ marginally mislabeled magnifying power ranges is solely a statement concerning RQ's own goods, not Carson's. *See* Complaint, ¶¶ 19-27. Nothing in the Complaint indicates that Defendants' alleged communications on Amazon or via the Internet were made in New York, originated from New York, targeted New York or even implicated Carson in New York. Simply put, Carson's Complaint does not allege any conduct by Defendants that occurred in New York.

II. Defendants lack sufficient contacts with New York

Notwithstanding the dearth of factual allegations in the Complaint, in reality, Defendants do not have enough contacts with New York to support an exercise of jurisdiction in this state over any of Carson's claims.

RQ Innovasion Inc. d/b/a Fancii Optics is a startup business formed by Brendan Zheng and Markus Zerulla, in Canada in late 2015. *See* Declaration of Brendan Zheng dated February 15, 2017 ("Zheng Decl.") at ¶¶ 16-23. RQ is in the business of, *inter alia*, designing and distributing magnifying glass products. Zheng Decl. at ¶ 23. RQ conducts some of its business via operation of the website located at the domain name <buy.shopfancii.com>, which provides information about its FANCII®-branded products and allows users to contact RQ in Canada (the "Fancii Website"). Zheng Decl. at ¶ 24.

RQ's products are available for purchase at the Fancii Website, and via links to Amazon.com and eBay.com. Zheng Decl. at ¶ 26. RQ's FANCII®-branded products are not available for purchase at retail stores, in New York or anywhere. Zheng Decl. at ¶ 25. With respect to sales on Amazon.com, RQ participates in Amazon's "Fulfilled by Amazon" ("FBA") program and ships its items in large batches to various Amazon fulfillment warehouses, none of which are New York, where Amazon packs and ships them to Amazon.com customers. Zheng Decl. at ¶ 27. Notwithstanding same, only a relatively small percentage of RQ's total products sold by Amazon.com, eBay.com or through the Fancii Website reach customers in New York: less than 6% of Amazon and eBay sales since 2015 to the present and less than 3% of sales (5 total transactions) via the Fancii Website. Zheng Decl. at ¶ 29. So the Court may understand the inapplicability of general jurisdiction in New York, these percentages represent the total quantity of sales of *all* of RQ's products—not just those six products identified in the Complaint. However, none of these minimal sales are at issue in this action.

Furthermore, RQ maintains its principal place of business in the Canada. Zheng Decl. at ¶ 22. RQ does not have an address in New York, does not maintain any bank account in New York, does not own any property in New York, does not have any agents or employees in New York, does not buy or sell any assets in New York, is not the owner or officer of any business in New York, is not the controlling shareholder of any corporation registered in New York, and has never instituted any legal action in New York. Zheng Decl. at ¶¶ 36-44.

Mr. Zheng is an individual and resident of Canada. Zheng Decl. at ¶ 4. Mr. Zheng is a shareholder of RQ and one of RQ's directors, in addition to Mr. Zerulla.

Zheng Decl. at ¶ 1. Mr. Zheng is not the owner, registrant or licensee of the Fancii Website. Zheng Decl. at ¶ 16. Mr. Zheng did not engage in any activity alleged in the Complaint in his individual capacity, as opposed to acting on behalf of the entity that operates the disputed Amazon storefronts and Fancii Website. Zheng Decl. at ¶¶ 2-21.

In any event, the Complaint is wholly deficient as to Defendants' purported contacts with or conduct in New York, and every act alleged therein occurred outside of this state. *See* Complaint.

III. Carson's Defective Pleading in the Complaint

As stated, Carson's Complaint is totally devoid of any conduct (not stated in a conclusory manner) that Mr. Zheng did in his individual capacity. *See* Complaint. The Complaint in each case lumps all Defendants together when describing the purportedly wrongful conduct. *See* Complaint. The Complaint charges Mr. Zheng by implication with being a controlling person of RQ, presumably in an attempt to hold Mr. Zheng individually responsible. *See* Complaint, ¶¶ 6-7, 18, 25. In conclusory fashion, Carson simply states that everything RQ did was "under the ownership, direction and control of Zheng." *See* Complaint, ¶¶ 6-7, 18, 25. There are no specific details as to Mr. Zheng's involvement whatsoever. *Id.*

Next, Carson's second cause of action alleges that RQ does not "charge, collect or pay applicable state sales taxes" in New York, such that RQ gains "an unfair competitive advantage against Carson." Complaint, ¶¶ 37-43. Further, Carson's Complaint lacks any allegation of direct consumer injury by RQ's statement concerning RQ's own goods, much less actual injury related to Carson beyond its role as another manufacturer of generic magnifying glass products. *See* Complaint.

Finally, while Carson alleges that it is a competitor of RQ, it asserts no facts that RQ's advertising targeted Carson or the State of New York. *See* Complaint. Indeed, the parties have no cognizable relation at all. Rather, the entire basis of Carson's Complaint is that it is another player in the enormous market of generic magnifying glass products on Amazon. Carson does not allege that RQ's advertising of its own products either reference or implicate Carson. Likewise, Carson's Complaint states no allegation of any pecuniary loss, loss in sales, or any direct impact on Carson's business related to RQ's advertising of RQ's own goods. *See* Complaint.

ARGUMENT

I. The Court must dismiss this action because it lacks personal jurisdiction over RQ and Zheng.

A. Legal Standard for Personal Jurisdiction

As with any action, the Court cannot reach the merits of a plaintiff's claims until it has personal jurisdiction over the defendant himself. *See, e.g., In re Rationis Enters., Inc. of Panama,* 261 F.3d 264, 267–68 (2d Cir. 2001) (treating personal jurisdiction as a threshold determination that precedes adjudication of the merits); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception."); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). Federal courts are courts of limited jurisdiction. When a defendant has raised a jurisdictional challenge, the plaintiff bears the burden of producing sufficient facts to establish that the exercise of personal jurisdiction is proper. *See Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185–86 (2d Cir.1998). A plaintiff must demonstrate jurisdiction over each defendant individually.

See Calder v. Jones, 465 U.S. 783 (1984). District courts may exercise personal jurisdiction over out of state residents to the extent permitted by the long arm statute of the forum state. *Spiegel v. Schulmann*, 604 F.3d 72, 76 (2d Cir. 2010). In the Second Circuit, courts must "first consider whether the requirements of the [New York] statute have been satisfied before proceeding to address whether the exercise of jurisdiction would comport with the Due Process Clause. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 61 (2d Cir. 2012).

New York has several jurisdiction statues under the Civil Practice Law and Rules ("CPLR"), the lot of which fall short of the full extent of the Due Process Clause of the United States Constitution. *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 71, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984) ("in setting forth certain categories of bases for long-arm jurisdiction, [the New York long-arm statute] does not go as far as is constitutionally permissible"). Although the Complaint is silent as to which statute it is proceeding under, CPLR § 302(a)(1) and (3) appear to be the applicable statutes. *See* CPLR § 302(a).

CPLR § 302(a) provides that courts in New York may exercise jurisdiction over an out-of-state defendant when the nonresident, "(1) transacts any business within the state or contracts anywhere to supply goods or services in the state" or "(3) commits a tortious act without the state causing injury to a person or property within the state . . . if he . . . [as to general jurisdiction] (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or [as to specific jurisdiction] (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." *Id.* Thus, CPLR § 302 authorizes a court to exercise personal jurisdiction over nonresidents only when the prescribed "minimum contacts" with the state are established. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

B. Carson Has Not Met Its Burden to Establish Personal Jurisdiction

i. Carson fails to allege any facts to support general jurisdiction in New York.

Carson falsely states that "RQ Innovasion, under the ownership, direction and control of Zheng, has continuously and extensively done business in this Judicial District" *See* Complaint, ¶ 6. RQ is a Canadian corporation and has its principal place of business in Canada. *See* Complaint, ¶ 3. Mr. Zheng is an individual and resident of Canada. *See* Complaint, ¶ 4; Zheng Decl., ¶ 4. Indeed, notwithstanding the pleading failures of the Complaint, RQ does not regularly engage in persistent or continual business in the State of New York. *See* Zheng Decl. at ¶¶ 22-44; *see also Medpay Systems, Inc. v. Medpay USA, LLC*, 2007 WL 110076 at *6 (E.D.N.Y. March 29, 2007). RQ has neither a New York office, nor agents in New York, nor employees in New York nor maintain any New York bank accounts. Even the minuscule sales to New York residents via Amazon.com or the Fancii Website do not subject RQ or Mr. Zheng to jurisdiction here. *See Stephan v. Babysport LLC*, 499 F. Supp. 2d 279, 286 (E.D.N.Y. 2007) ("While the alleged infringing product was offered for sale in New York stores, these sales— however substantial — do not create personal jurisdiction over [non-resident] Babysport or over Habeeb. This is true even in light of defendant's alleged solicitation via its website."). The only connection to New York is that Carson is located here. Simply put, the Complaint is wholly deficient of any facts that would support an exercise of general jurisdiction over RQ or Mr. Zheng in New York.

ii. Carson fails to allege facts to support specific jurisdiction in New York.

Carson's conclusory allegations also fail to establish that RQ or Mr. Zheng, non-resident Defendants, possessed the requisite "minimum contacts" with New York to support an exercise of specific jurisdiction under Section 302. In the Second Circuit, a plaintiff must posit facts that, by virtue of his internet activities, "the defendant purposefully avail[ed him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, and over which the New York legislature intended New York courts to have jurisdiction." *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 253 (2d Cir. 2007) (internal quotation marks omitted).

New York's CPLR § 302(a)(3) "provides for the exercise of jurisdiction over a defendant . . . who commits a tortious act outside of New York that causes injury within New York [and] the defendant's activities must meet one of the two sets of statutory criteria set forth in subsections (i) or (ii) of Section 302(a)(3)." *Babysport, LLC*, 499 F. Supp. 2d at 288 (emphasis added).

> As to subsection (i), jurisdiction is proper if, in addition to commission of the tortious act outside of New York with instate consequence, the defendant either: (1) regularly does or conducts business in New York, (2) **engages in any other "persistent course of conduct" in New York**, or (3) derives substantial revenue from goods used or services rendered in New York.
>
> As to subsection (ii), jurisdiction is proper, if, in addition to commission of the tortious act outside of New York with instate consequence, the defendant: (1) **expects or should reasonably expect his acts to have New York consequences** and (2) derives "substantial revenue" from interstate or international commerce.

Babysport, LLC, 499 F. Supp. 2d at 288 (emphasis added); N.Y. C.P.L.R. § 302(a)(3)(i)-(ii).

As a threshold matter, while Carson alleges that it is a competitor of RQ, it asserts no facts that RQ's advertising targeted Carson or the State of New York. Indeed, the parties have no cognizable relation at all. Rather, the entire basis of Carson's Complaint is that it is another player in the enormous market of generic magnifying glass products on Amazon.

Assuming RQ did commit an act outside in Canada, Carson fails to allege, and ultimately cannot prove, that the situs of an injury was New York, versus Washington or Canada. *United Mobile Techs., LLC v. Pegaso PCS, S.A. de C.V.*, 509 F. App'x 48, 50 (2d Cir. 2013) ("Courts usually find the situs of the injury, in tortious interference actions, is where the company "lost business," not the location from which the company primarily operates."). Carson's Complaint is utterly silent here. At best, where Carson "lost business" where it was dealing with Amazon, i.e. Washington, or alternatively, the "original event" causing injury was RQ's communications, which all emanated from Canada. *See Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 209 (2d Cir. 2001)("the situs of injury for purposes of asserting long arm jurisdiction is the place where the underlying, original event occurred which caused the injury.") Thus, the situs is not even New York.

Finally, Carson fails to make any showing that RQ or Mr. Zheng either (as to subsection (i)) engage in a "persistent course of conduct" in New York or (as to subsection (ii)) "expect [] or should reasonably expect [their] acts to have New York consequences."

First, RQ's sales of products are not sufficiently related to Carson's claims herein to constitute a transaction of business under CPLR § 302(a)(1) which would warranting haling Defendants into New York. If any of those parties were the plaintiff, and not Carson, on an action concerning the sale of *that product to them*, that argument might begin to make sense. However, here, that is not the case nor is it the law. *See In re Libor-Based Fin. Instruments Antitrust Litig.*, 2015 WL 4634541, at *22 (S.D.N.Y. 2015)("Personal jurisdiction may not be exercised on the basis of a defendant's "random, fortuitous, or attenuated contacts."). Any sale by RQ to any other party is inconsequential. Furthermore, Carson does not allege that RQ's marketing targeted New York specifically. The **sales** of RQ's products are not issue—Carson complains only of the **marketing**. If RQ sold 100 products to 100 different customers in New York, Carson would still not attain personal jurisdiction over RQ (much less Mr. Zheng) for *Carson's claims*.

New York's "single transaction" test under CPLR] § 302(a)(1) is not a universal truth for every cause of action. RQ's (or Amazon's) shipment of RQ's goods into New York have no bearing on Carson's claims for false advertising. To so hold would make every business subject to suit in New York for every cause of action, simply by shipping products in to New York. *See Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 762-63 (2d Cir. 1983) ("The shipment of goods into New York does not *ipso facto* constitute doing business."). Further, this is not a trademark infringement suit where the sale of *an infringing product* into a forum could subject a party to personal jurisdiction there. Again, RQ's shipments into New York are irrelevant. The fact that RQ has registered its FANCI® trademark is also inconsequential. On the facts of this case, RQ's shipment of goods is "not sufficiently related" to Carson's causes of action for false advertising or its duplicative and/or cryptic "unfair competition" claim. *See Beacon*, 715 F.2d at 765 ("Menzies' shipments of goods into New York are irrelevant to Beacon's declaratory judgment action and Beacon's cause of action would exist regardless of whether Menzies' products were sent to New York.").

Considering the purported advertising occurred on the Internet via Amazon and/or eBay, Carson's cause of action for false advertising would exist regardless of whether RQ's products were sent to New York, or if they were even sold at all. *See Skrodzki v. Marcello*, 810 F. Supp. 2d 501, 517 (E.D.N.Y. 2011); *Sayeedi v. Walser*, 15 Misc.3d 621, 835 N.Y.S.2d 840 (N.Y.City Civ.Ct.2007) ("[T]he usual online auction process does not rise to the level of purposeful conduct required to assert specific jurisdiction."); *Jones v. Munroe,* 2 Misc.3d 24, 25, 773 N.Y.S.2d 498, 498 (1st Dep't 2003) (finding a sale on eBay is was an "isolated sales transaction, the result of "random" and "attenuated" contacts, [and] was insufficient to confer personal jurisdiction."). To the extent that Carson states any cause of action against Defendants at all, those claims are not properly situated in New York—chiefly because Defendants have not connection to nor ever targeted New York. Carson has not alleged an injury related to Defendants' advertising and Defendants had no idea who Carson was nor where Carson is located, such that Carson's location in New York should not be a predicate for personal jurisdiction here.

Next, as stated above, RQ is not doing business in New York sufficient to support any prong of CPLR § 302(a)(3)(i) (see Section I(B)(i) *supra*), such that the Court need not even consider the "substantial revenue" prong. *See Babysport, LLC*, 499 F. Supp. 2d at 289. Similarly, Mr. Zheng has conducted no business activities in his individual capacity. *See* Zheng Decl. at ¶¶ 16-21.

Carson fails under CPLR § 302(a)(3)(ii)'s criteria as well. The only possible connection with New York is that Carson is based here. Carson's allegation that RQ advertised its products with marginally mislabeled magnifying ranges, without anything more, does not somehow subject RQ or Mr. Zheng to personal jurisdiction here just because Carson is based here. *Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 326, 402 N.E.2d 122, 126 (1980) ("[T]he only possible connection between the claimed conversion and any injury or foreseeable consequence in New York is the fact that Standard is incorporated and maintains offices there. It has, however, long been held that the residence or domicile of the injured party within a State is not a sufficient predicate for jurisdiction, which must be based upon a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there.").

Carson claims that RQ's advertisement of RQ's products was destined to injure a competitor, and since Carson is in New York, it would likely claim that the injury was suffered there. That is simply not enough. The Complaint presents no allegation that RQ *knew* that Carson was in New York, or that its advertisements of its own products would affect any business, entity or consumer in New York.

Despite Carson's passionate pleas, RQ does not and did not "target" Carson when marketing RQ's own goods on Amazon. In addition to it being impossible for RQ to do so under Amazon's automatic sponsored ad campaigns (*See* Zheng Declaration dated February 15, 2017), even if it were true that RQ was using "Carson" or a Carson mark, the Second Circuit has routinely rejected the premise that keyword advertising that is not likely to cause consumer confusion is actionable under the Lanham Act. *See Alzheimer's Found. of Am., Inc. v. Alzheimer's Disease & Related Disorders Ass'n, Inc.*, 2015 WL 4033019, at *6 (S.D.N.Y. 2015). RQ's conduct is even less extreme because RQ does not have control over the sponsored ad process—that is Amazon exclusively. *See* Zheng Decl. at ¶¶ 30-35. Thus, if RQ's Amazon advertising is a jurisdictional contact at all, it is definitely not a tortious act without the state causing injury within the state because such conduct is non-actionable under the Lanham Act. As attenuated and speculative contacts are simply not enough, Carson has failed its burden to demonstrate the applicability of this Court's assertion of personal jurisdiction.

Again, RQ and Mr. Zheng are in Canada. Complaint does not even allege that RQ was aware of Carson's presence in New York. Carson's benighted, attorney argument that RQ "places [] false ads on Carson's Amazon listings" appears nowhere in the Complaint. *See* (ECF No. 12) at 3. In any event, RQ has no control over Amazon's website or Amazon's cross-product advertisements and does not use "Carson," any of Carson's trademarks or any other parties' trademarks in its own keyword advertising. *See* Zheng Decl. at ¶ 35. RQ simply advertises its own generic magnifying glass products—and while Carson may take issue with that, those advertisements, absent something more, do not subject RQ or Mr. Zheng to personal jurisdiction in New York.

Thus, this case concerns the claims of a New York company arising from events that took place in Canada by a Canadian company (or Canadian individual). Nothing allegedly occurred in New York such that RQ could ever have expected its alleged acts to have New York consequences. Thus, there is no basis for the Court to conclude that RQ *knew* its advertisements of its own products would have an effect in New York.

C. Any assertion of personal jurisdiction would offend the Due Process Clause.

Even were the Court to decide that an exercise of jurisdiction under New York's long-arm statute were proper, it "then must decide whether such exercise comports with the requisites of due process." *See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996); *Richtone Design Grp., LLC v. Live Art, Inc.*, 2013 WL 5904975, at *7 (S.D.N.Y. 2013); *Sichkin v. Leger*, 2012 WL 3150583, at *3 (E.D.N.Y. 2012). Here, Carson does not dispute that Defendants have no contacts with New York—absent RQ's sales of some products here. Moreover, Carson does not even allege any injury. Thus, no act alleged in the Complaint attributable Defendants could be understood as "purposely availing" Defendants to the laws of New York for *these claims*. Put another way, if it is insufficient in a Lanham Act non-comparative false advertising case for a plaintiff to be entitled to damages if that plaintiff fails to allege a direct injury attributable to the defendant's allegedly false advertisements, then it should also be insufficient for personal jurisdiction purposes to hale that defendant into the forum where the injury-deficient plaintiff is. Ironically, that is precisely what Carson is attempting to do here. Absent this nexus between the "minimum contacts" and the claims in this action, an assertion of jurisdiction would offend the Due Process Clause.

Even if RQ sold some products in New York, it should not be subject to jurisdiction in New York on *any claim* brought by *any person*. This would gut the Due Process Clause and make New York's long-arm statute devoid of any meaning. Carson's interpretation of "specific jurisdiction" is flawed and illogical. *See In re Libor*, 2015 WL

4634541, at *23 (finding non-suit-related conduct does not subject party to specific jurisdiction). Here, Carson's claims do not "arise out of" or even "relate to" RQ's sale of products in New York state or any other state. Put another way, even though Defendants may have some contacts with New York with respect to the sale of lenses to other parties, neither Carson's Lanham Act non-comparative advertising claim nor its "unfair competition" claim have any proximate relation to those sales. There is no nexus between RQ's New York contacts in the Complaint (as none are alleged) or concerning past *de minimis* sales of its products to non-party New Yorkers and Carson's action for false advertising.

Similarly, beyond Carson's absent jurisdictional allegations against Mr. Zheng individually, Carson's alleged facts as to Mr. Zheng's involvement would not satisfy the requirements of due process. Specifically, Carson fails to allege that Mr. Zheng has such individual involvement or was the primary actor in RQ's alleged marketing, and in reality his involvement is non-exclusive and minimal. *See* Zheng Decl. at ¶ 17-21. Thus, it would not be fair and reasonable to hale Mr. Zheng to New York on any claim asserted.

Carson's entire jurisdictional argument is based on the long-rejected premise that because it was in New York, that Defendants' should be subject to personal jurisdiction here. Other than that, none of the "minimum contacts" attributable to Defendants cross paths with Carson at all. Unfortunately for due process concerns, this is simply not enough. *See Fantis Foods, Inc. v. Standard Importing Co*. 49 N.Y.2d 317, 326 (1980)

D. Federal long-arm jurisdiction's requirements have not been satisfied.

Finally, to the extent that Carson may argue, its claims do not qualify it for federal long-arm jurisdiction under Fed. R. Civ. P. 4(k)(2). Carson fails to satisfy its threshold burden to show "that personal jurisdiction is not available under any situation-specific federal statute" and to "certify that, based on the information that is readily available to the plaintiff and his counsel, the defendant is not subject to suit in the courts of general jurisdiction of any state." *Porina v. Marward Shipping Co.*, 2006 WL 2465819, at *4 (S.D.N.Y. Aug. 24, 2006), *aff'd,* 521 F.3d 122 (2d Cir. 2008). Carson cannot pass this burden on to Defendants nor, in conclusory fashion, assume that jurisdiction is improper everywhere else. The inferential leap that Defendants are not subject to jurisdiction has no support in fact in the Complaint, and would improperly excuse plaintiff of its burden to demonstrate the availability of federal long-arm jurisdiction. *See, e.g.*, *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999).

E. Carson fails to assert jurisdictional facts specific to Mr. Zheng.

1. Likewise, Mr. Zheng did no act alleged herein in his individual capacity, much less anything to subject him to personal jurisdiction. To the extent that Carson claims that the disputed advertisements were created "under the direction of" Mr. Zheng, there is no evidence in the record that Mr. Zheng is responsible, in his individual capacity, for any content posted on the Fancii Website or Amazon, such that he is subject to jurisdiction in this forum. Plaintiff cannot avoid its burden of establishing jurisdiction over Mr. Zheng by imputing the actions of RQ on to him. *See Brady v. Basic Research, LLC*, 101 F. Supp. 3d 217, 230 (E.D.N.Y. 2015) ("Plaintiffs' allegations must "sufficiently detail the defendants' conduct so as to persuade a court that the [individual] defendant was a 'primary actor' in the specific matter in question; control cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation." (quoting *Karabu*

Corp. v. Gitner, 16 F. Supp. 2d 319, 324 (S.D.N.Y. 1998)). Mr. Zheng has stated unequivocally that he has never individually (or in any other capacity) conducted business activities in New York. RQ has staff, other directors and shareholders, just as any full functional business does. Zheng Decl. at ¶ 17-21. Besides Mr. Zheng, RQ's board of directors also includes Markus Zerulla, who also has significant decision-making authority as to the nature of RQ's business. Zheng Decl. at ¶ 17. RQ's staff includes 4 to 5 independent contractors and freelance developers, including a contractor who maintains the FANCII® website, a contractor who handles all customer service, a product sourcing agent, a sales manager/purchasing agent and a graphic designer. Zheng Decl. at ¶ 18. Mr. Zheng does not exercise 100% control over RQ's operations. Zheng Decl. at ¶ 20.

Conclusory allegations devoid of "any factual specificity" are insufficient to support an exercise of jurisdiction over a corporate officer. *See Gitner*, 16 F. Supp. 2d at 324 ("As alleged, this Court thus has no basis for knowing whether the six named defendants actually orchestrated the allegedly tortious conduct, or were named in the Complaint simply because their names appear at the top of TWA's masthead."). As such, Mr. Zheng should be summarily dismissed from this action.

Accordingly, any exercise of jurisdiction over RQ or Mr. Zheng would be constitutionally unreasonable. Thus, Defendants respectfully submit that the Court grant the motion to dismiss for lack of personal jurisdiction.

II. Carson fails to state a cause of action against Defendants under the Lanham Act (Count One) because they have not alleged injury proximately caused by Defendants Acts.

A. Legal Standard on Rule 12(b)(6) Motion

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). Although this rule "does not require 'detailed factual allegations,'" *id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)), "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555); *see also id.* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) , "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. *Iqbal* and *Twombly* highlight two principles: (1) a court is not bound to accept as true legal conclusions couched as factual allegations and (2) "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.*

B. Carson's Claim under Count One Fails

As stated above, Carson has not alleged that any of RQ's advertising of RQ's *own* products, either reference or implicate Carson. Further Carson does not allege any actual pecuniary loss. As a matter of law, Carson's claims must be dismissed entirely.

Carson's Complaint suffers from a fatal flaw—it never asserts that Carson's alleged injury was caused by the Defendants' alleged false advertisements. This is a fundamental issue with respect to Carson's entire complaint—the absence of causation. Indeed, Carson fails to allege that it even lost any sales due to Defendants' alleged conduct. The only allegations that come close to describing some injury are paragraphs

30 and 31 of the Complaint. However the "damage" alleged therein is nothing more than a general grievance against the market, and does nothing to trace Carson's requisite injury to Defendants' advertising. If Carson cannot articulate how Defendants' alleged conduct caused it any damage, then it should not be permitted to seek such relief herein. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014)("to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales. . . . If a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed."); *see aslo*, *Burndy Corp. v. Teledyne Industries, Inc.*, 748 F.2d 767 (2d Cir. 1984)(causation related to defendant's false advertising "must first be established."). More than a matter of statute, an allegation of direct injury flowing from the allegedly false statement is a necessary requirement to a Lanham Act claim. *See Lexmark*, 134 S. Ct. at 1390-91 ("[A] statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute. . . We thus hold that a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff."); *see also, Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F. 2d 197 (9th Cir. 1989) ("[S]ome injury *resulting from the deception* is an essential element of the plaintiff's [Section 43(a)] case.")(emphasis in original).

This is not a narrow field—the Court may take judicial notice of the fact that many companies and individuals sell millions magnifying glasses on Amazon and eBay by performing a simple search. This is not a product disparagement case or trademark infringement matter where the injury to the plaintiff is obvious. Rather, the products at issue are simply generic magnifying glasses sold in an open market. Merely being a player in the market does not entitle Carson to sue if it has not alleged any injury. Absent some allegation that RQ's advertising had a cognizable, direct impact on Carson's business, its Lanham Act claim must be dismissed. *See Lexmark*, 134 S. Ct. at 1390. In reality, RQ did nothing to implicate Carson directly, and any damage Carson would ever claim would be attenuated and speculative such that to permit its claims to continue absent any allegation of injury would be an unjust windfall for Carson. *See Porous Media Corp. v. Pall Corp.*, 119 F. 3d 1329, 1334 (8th Cir. 1997) ("where a defendant is guilty of misrepresenting its own product without targeting any other specific product, it is erroneous to apply a rebuttable presumption of harm in favor of a competitor. Otherwise, a plaintiff might enjoy a windfall from a speculative award of damages by simply being a competitor in the same market."). Here, the situation is worse because Carson fails to even *allege* any injury to its sales or reputation attributable to Defendants' advertisements. Presumptively, none exists and the case should be dismissed.[2]

Finally, absent an allegation that Carson has been or will be harmed by Defendants' alleged false statement, Carson is also unable to demonstrate a *likelihood* of injury. *See Johnson & Johnson*, 631 F. 3d at 189 ("[S]omething more than a plaintiff's mere subjective belief that he is injured or likely to be damaged is required before he will be entitled even to injunctive relief."); *see also Pom Wonderful LLC v. Ocean Spray Cranberries, Inc.*, No. CV 09-00565 DDP RZX, 2011 WL 4852472, at *3 (C.D. Cal. Oct. 12, 2011) (denying relief in non-comparative false advertising case which made no direct reference to any competitor where competitor had "not shown even a likelihood that it will be harmed by [the] allegedly false statements."). As such, Carson's Count One should be dismissed in its entirety.

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[2] Indeed, the Second Circuit has historically and repeatedly disapproved of permitting pecuniary relief in cases just like this one: an "own goods" false advertising case where the claims are totally unrelated to a competitor. *See, e.g.*, *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 316 (2d Cir. 1982); *see also Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 189-90 (2d Cir. 1980). Pecuniary damages are simply impropriate here.

III. Carson fails to state a cause of action against RQ under unfair and deceptive trade practices (Count Two)

A. Carson's Claim under Count Two Fails

Carson's second cause of action alleges that RQ does not "charge, collect or pay applicable state sales taxes" in New York, such that it gains "an unfair competitive advantage against Carson." This argument fails as a matter of law and should be dismissed.

First, as an out-of-state business without any additional connection or "substantial nexus" to the State of New York, RQ is not required to collect or pay sales taxes in the State of New York. *See,* N.Y. Tax Law § 1101(b)(8); *see also* N.Y. State Tax Bulletin ST-175, accessible at tax.ny.gov/pubs_and_bulls/tg_bulletins/st/do_i_need_to_register_for_sales_tax.htm (last accessed on February 15, 2017); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (Commerce Clause restricts state-imposed taxes on out-of-state businesses without physical presence in state); *cf. Overstock.com v. New York Dept. of Taxation*, 20 N.Y.3d 586, 596 (2013). Contrary to Carson's allegations, RQ has no "association with

Amazon." It is an independent seller operating out of Canada—thus, the State of New York does not require sales tax to be collected and Carson's claims fail as a matter of law.

Second, even if sales taxes were required to be collected, the Supreme Court has summarily rejected Carson's "unfair competition" theory for want of proximate causation. *See, e.g.*, *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459-60 (2006) (failure to pay taxes does not entitle competitor to private right of action). Indeed, the same Commerce Clause-based reasoning in *Quill* also militates against maintaining Carson's grievance here: that New York-based Carson pays taxes for operating in New York, and other non-New York entities do not, does not entitle Carson to call foul. To the extent that Carson implies RQ charges lower prices, this is nothing but legitimate competitive activity—not actionable wrongdoing.

Third, while Carson claims that RQ does not "charge[], collect, or pay" sales taxes, it truly has no knowledge. Thus, as Carson's second cause of action is made exclusively "upon information and belief," it has failed to plead this count with requisite particularity under the *Twombly* standard.

Fourth, Assuming, *arguendo*, that Carson would allege that its second count is really a N.Y. General Business Law § 349 claim, it still fails because Carson does not allege any direct injury. *See, e.g.*, *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995)("A prima facie case requires as well a showing that . . . that plaintiff has been injured by [defendant's acts]."). Due to Carson's failure to allege injury as a result of Defendants' actions and, the attenuated nature of its purported injury, its purported § 349 claim would also fail.

As Plaintiff's has not stated a claim, Count Two of the Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

IV. All Claims against Zheng Fail to Meet the Legal Standard

In addition to the pleading failures stated above, Carson has not alleged that Mr. Zheng did anything in his individual capacity. Through the allegations in its Complaint and its papers previously filed in the instant proceeding, Carson improperly attempts to lump the actions of RQ and Mr. Zheng together. In conclusory fashion, Carson simply states that everything RQ did was "under the ownership, direction and control of Zheng." *See* Complaint, ¶¶ 6-7, 18, 25. There are no specific details as to Mr. Zheng's involvement whatsoever. *Id.* Under Carson's theory, every owner or corporate officer would be exposed to individual liability in every case by simply stating Carson's magic phrase "under the ownership, direction and control." That would be an absurd result.

In reality, Mr. Zheng is but one of many people involved with RQ's business, and has no individual involvement other than his managerial role he shares with Mr. Zerulla. Zheng Decl. at ¶ 17.

Further, individual liability in the context of an "own goods" advertising case is virtually unheard of. The case relied upon by Carson at ECF No. 12 (and presumably will be cited in response to Defendants' motion herein) are all based on underlying *trademark* infringement. *See Merck Eprova AG v. Brookstone Pharm., LLC*, 920 F.Supp.2d 404, 428 (S.D.N.Y. 2013). Because Carson fails to assert any fact or theory warranting individual liability against Mr. Zheng, all claims against him must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the foregoing reasons, Defendants respectfully requests that the Court (i) dismiss this action, because neither RQ nor Mr. Zheng are subject to personal jurisdiction in New York, and (ii) dismiss this action, because Carson fails to state a cause of action against Defendants as to all counts.

Dated: Brooklyn, New York
February 15, 2017

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